"Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court or a Judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

Counsel for the appellant argued that the respondent had sued the wrong party and that he should have sued Westlake Timber Sdn. Bhd. He argued that the latter company and not the appellant was liable. The learned trial judge noted that though this point of law was not argued, in effect the appellant Vu Siew Chin had been trading under the name and style of Westlake Timber Sdn. Bhd. and should not be excluded from being part and parcel of the company being the sole owner. There was evidence that she had acknowledged the payment for and on behalf of the company in the documents agreed by both sides, an admission that she would pay debts of the company, if necessary. The learned judge went on to say that the defence did not show that the appellant was in fact not authorised to sue the company and held that the law on this point is clear.

In *Mason & Son* v. *Mogridge*[1] a full Bench of the Queens Bench Division held that a single person cannot sue in a firm name.

However there is nothing to prevent a person being sued in the firm name a proposition which finds support in *Mallal's* Supreme Court Practice 0.48A r.11; see notes under the heading "May be Sued". See also notes made under 0.81 r.1 of the *Supreme Court Practice 1979 (White Book)* under heading "May sue or be sued".

The learned trial judge cited Australian Company Law and Practice by *Wallace and Young* – "where a contract is signed on behalf of a company by a person who could have been authorised, it will be presumed that he was so authorised."

We need not rely on the presumption because we are of the view that the law goes even further and allows a person who is the sole owner of the company to be sued in the company name.

The parties would like a re-trial but we think that course is not open to us.

We agree with the finding of the learned trial judge and dismiss the appeal with costs. Deposit to the respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Gill & Tang; Ong Ban Chai & Razak.*

CHENG CHUAN DEVELOPMENT SDN. BHD. v. NG AH HOCK

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) April 28 & June 10, 1982]
[Kuala Lumpur – Federal Court Civil Appeal No. 25 of 1981]

Contract – Building contract – Agreement to buy shophouse – Booking proforma – Vendor increasing price unilaterally – Repudiation of contract – Anticipatory breach – Whether repudiation accepted by purchaser – Booking fee refunded by vendor – Cheque cashed by solicitors for purchaser – Whether this constitutes estoppel – Waiver – Damages – Measure of damages – Interest – From when payable.

Housing Developers – Sale of shophouse – Booking proforma – Vendor increasing price unilaterally – Repudiation of contract – Damages.

In this case the respondent had booked a shophouse constructed by the appellant who was a housing developer for $49,500. He paid $1,000 as a booking fee and signed a booking proforma. The booking proforma contained no provisions entitling the appellant to increase the price unilaterally. However, the appellant informed the respondent by letter that the price had been increased to $85,000 and the respondent was requested to pay a sum of $7,500 in order to make up with the $1,000 booking fee a 10% of the new price and to sign a purchase agreement. The respondent did not agree to the price increase. His solicitors sent a cheque for $3,950 towards the payment of the 10% of the agreed purchase price. The appellant's solicitors returned the cheque for $3,950 and also sent a cheque for $1,000 being the refund of the booking fee. The respondent was offered the shophouse at a reduced price of $81,000 and was told that if he agreed he should send a cheque for $8,100. The respondent did not accept the offer but his solicitors cashed the $1,000 cheque which was sent by the appellant's solicitors as a refund of the booking fee. The respondent then changed solicitors and the new solicitors sent a cheque for $1,000 to replace the booking fee. The cheque was not accepted by the appellant. The respondent sued the appellant for specific performance or alternatively for damages for breach of contract. Yusoff Mohamed J. gave judgment in favour of the respondent and the appellant appealed.

Held: (1) in this case there was a repudiation of the contract by the appellant and his refusal to sell the shophouse at the agreed price constituted an anticipatory breach of contract;

(2) the acceptance of the refund of the booking fee was neither a waiver of the respondent's right to performance nor an estoppel preventing him from suing the appellant for damages, but, if at all, could be construed as an acceptance of the appellant's repudiation of the contract, which in turn brought the contract to an end and at the same time entitled him to sue for damages;

(3) the respondent was only entitled to a sum of money which would compensate him for the loss which naturally arose from the breach. In the case of breach of contract assessment of damages has to be made on the date of the breach and in this case the learned trial judge had

correctly assessed the damages to be $35,500, that is, the difference between the contract price and the price at which the shophouse was sold to the third party ($85,500). This was the amount the respondent had to find if he were to buy the house or another house as a substitute and that was the amount which could be regarded as naturally flowing from the breach;

(4) the learned judge was correct in awarding the interest to commence from the date of the judgment until the date of satisfaction.

Cases referred to:

(1) *Besseller Waechter Glover and Co.* v. *South Derwent Coal Co. Ltd.* [1938] 1 K.B. 408.
(2) *Banning* v. *Wright* [1972] 1 W.L.R. 972, 981.
(3) *Hughes* v. *Metropolitan Rly. Co.* (1877) 2 App. Cas. 439, 448.
(4) *Birmingham and District Land Co.* v. *London and Northern Western Railway Co.* (1889) 40 Ch.D. 268, 286.
(5) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130.
(6) *Charles Rickards Ltd.* v. *Oppenhaim* [1950] 1 K.B. 616, 623.
(7) *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor.* [1981] 1 M.L.J. 56, P.C.
(8) *Engell* v. *Fitch* (1868-1869) L.R. 4 Q.B. 659, 669.
(9) *Lee Heng & Co.* v. *C. Melchers & Co.* [1963] M.L.J. 47.

FEDERAL COURT.

S. Balarajah (*Rosita Yeo* with him) for the appellant.

Chuah Ai Huah for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): This is an appeal from the decision of Yusoff Mohamed J. The facts are not in dispute and are as follows:

The appellant is a company, whose business is that of a housing developer and at the material time was engaged in developing and building shophouses for sale. On March 3, 1973 the respondent booked one of the shophouses which were to be constructed on a private Lot No. 92 at Ulu Tiram, Johore for $49,500. He paid $1,000 as a booking fee and signed a booking proforma. One of the stipulations contained in the proforma is that within two weeks of receipt of a notice from the appellant the respondent must pay to the appellant a sum of $3,950 which (together with the $1,000 booking fee) will make a 10% of the price and the respondent was also required to sign a purchase agreement. Failure to comply with this notice would result in the respondent losing the shophouse and a forfeiture of the booking fee. The booking proforma however contains no provisions entitling the appellant to increase the price unilaterally.

However, on August 28, 1974 the respondent was informed by the appellant by a letter of the same date that the price of the shophouse was increased to $85,000 due to increase in the price of building materials and labour charges. The respondent was requested to pay a sum of $7,500 in order to make up with the $1,000 booking fee a 10% of the new price and to sign a purchase agreement.

The respondent did not agree to the price increase and did not comply with the request. Subsequently on September 10, 1974 his solicitors (Kumpulan Gan & Lim) wrote to the appellant's solicitors a letter objecting to the price increase and insisting that the old price be observed. In the same letter the respondent's solicitors sent a cheque for $3,950 towards the payment of the 10% of the contract price agreed to in the booking proforma. And on October 20, 1974 his solicitors sent another letter reiterating that the appellant was not entitled to increase the price unilaterally.

On November 21, 1974, the appellant's solicitors (Messrs. A. L. Looi) returned the respondent's $3,950 cheque and another cheque for $1,000 being the refund of the booking fee. In this letter the respondent was offered the shophouse at a reduced price of $81,000 and was told that if he agreed he should send a cheque for $8,100 being the 10% of the new price and also should sign a purchase agreement which was enclosed in the same letter.

The respondent did not accept the offer. But his solicitors on January 13, 1975 cashed the $1,000 cheque which was sent by the appellant's solicitors as a refund of the booking fee. Consequently the respondent changed solicitors and his new solicitors (Messrs. Yeow & Chin) on February 2 and March 11, 1975 wrote to the appellant's solicitors inquiring if they had instructions to accept service of writ to be issued by the respondent. In their letter of 11th March the respondent's new solicitors also sent a cheque for $1,000 to replace the booking fee which was returned to and cashed by the respondent's former solicitors (Kumpulan Gan & Lim). This cheque was not accepted by the appellant's solicitors, who finally sent it back to the respondent's new solicitors on May 26, 1975.

Finally the respondent sued the appellant for specific performance of the contract and alter-

natively for damages on account of breach of the contract. In its statement of defence the appellant contended that by the refund of the booking fee of $1,000 having been accepted by the respondent's solicitors, Kumpulan Gan & Lim, the respondent was estopped by conduct from claiming his rights under the contract.

As the shophouse had already been sold by the appellant to a third party, the respondent quite properly dropped the claim for specific performance and pursued his claim for damages only.

At the trial before Yusoff Mohamed J. it was a common stand of both parties that the booking proforma signed by the respondent constituted a contract between them and that the appellant committed a breach of the contract by unilaterally increasing the price of the shophouse from $49,500 to $85,000, though it was subsequently offered to the respondent for $81,000. What was in issue between the parties at the trial was the legal effect of the refund of $1,000 booking fee which was accepted and cashed by the respondent's former solicitors. The appellant contended that acceptance of the refund amounted to a waiver and as such the respondent should not be entitled to damages. The learned judge, however, overruled the submission and held that the acceptance did not constitute a waiver in as much as the refund cheque was not accepted nor cashed by the respondent but by his former solicitors who were subsequently replaced by his present solicitors. Quoting *Besseler Waechter Glover and Co.* v. *South Derwent Coal Co. Ltd.*[1], the learned judge held that there was no waiver of the respondent's right to performance of the contract because in his view there was no voluntary forbearance on the part of the respondent.

In the appeal before us counsel for the appellant repeated his submission made before the learned trial judge and further submitted that acceptance of the refund of the booking fee coupled with a period of the respondent's silence and delay in returning to the appellant the refunded booking cheque did not only constitute a waiver but also an estoppel by conduct, disentitling the respondent to maintain this suit. Thus the issues before us were:

(i) whether the cashing of the refund cheque constituted a waiver by the respondent of his right to insist upon performance of the contract; and

(ii) whether his act in remaining silent for a period of three months and twenty days between November 21, 1974 (the date when the refund cheque was sent to the respondent's former solicitors) and March 11, 1975 (the date when the respondent's new solicitors sent another cheque to replace the refund cheque) constituted an estoppel preventing the respondent from claiming any damages against the appellant.

Counsel for the appellant spent a good deal of time referring us to cases and authorities on estoppel but he made no real efforts to show us how those cases are applicable to the facts in the present appeal or in what way they are relevant.

His argument on estoppel – of whatever description, whether estoppel in pais or promissory estoppel or quasi estoppel – could be negatively answered in that estoppel being an equitable doctrine could only be invoked by a party who comes to court with clean hands. The appellant must therefore show that it had an equity to enforce against the respondent. According to the time-honoured maxim he who comes to equity must come with clean hands. In this case as counsel for the appellant conceded that the appellant committed a breach of contract by unilaterally increasing the contract price of the shophouse, we cannot see how the appellant could claim an equity when it was clearly a guilty party merely because the appellant's refund cheque was accepted by the respondent's former solicitors and his new solicitors returned another cheque of an equivalent amount on March 11, 1975 – i.e. about three months and twenty days after the refund cheque was received. In any case it is clear from the letters written by the respondent's solicitors dated September 10 and October 20, 1974 and February 2 and March 11, 1975 that the respondent maintained throughout that he did not agree to the price increase and that he never gave up his right to sue. Thus there is no basis upon which an equity could arise in favour of the appellant by the so-called delay on the part of the respondent in returning the amount of booking fee refunded to his former solicitors. In fact after the refund cheque was cashed the respondent engaged new solicitors who immediately wrote on February 2, 1975 to the appellant's solicitors enquiring from them if they had instructions to accept service of a writ to be issued by the respondent.

The appellant's counsel argued that the respondent's silence during the relevant period could be relied upon by the appellant as a representation on the part of the respondent that he was no longer interested in buying the shophouse, thus entitling

it to resell the shophouse and so arose an estoppel in its favour. This argument is completely unsupported by facts. It is not true that the respondent was not interested in buying the shophouse. He wanted to buy it but at the contract price and was not willing to pay the increased price for it. His new solicitors' letter dated February 2, 1975 clearly supports this fact. For an equity to result in the appellant's favour, it has to show what disadvantage or prejudice was caused to it by relying upon the so-called silence of the respondent. On the contrary rather than showing disadvantage the evidence clearly shows that the appellant not only broke the contract by refusing to sell the shophouse at the contract price but also made a clean profit of $35,500 when according to the evidence of its Managing Director (DW1) the appellant "resold the property at $85,000". This sale in effect is another act of breach of the contract. Where is the disadvantage then? We therefore hold that the submission on estoppel must fail.

As to counsel's submission on the question of waiver, we cannot see the relevancy of this rule in the context of this case. The word "waiver" is a vague term and according to Lord Hailsham of St. Marylebone L.C. it is not a term of art. (*Banning* v. *Wright*[2]). In its application in the law of contract the word is commonly used to describe a concession or indulgence voluntarily granted by one party to the other for the convenience and at the request of that other party by not insisting upon the precise mode of performance provided in the contract. (*Halsbury's* Laws of England, Vol. 9, 4th Ed. para 572). A waiver thus deals with the *mode* of performing the contract. It does not excuse the party to whom indulgence is granted from performing it altogether. A waiver is given without any consideration at all and as a matter of legal history the principle was developed by judges – purely as a device to evade the Statute of Frauds which enacted that a contract required to be evidenced by writing could only be altered or varied by a subsequent contract similarly evidenced. In commercial transactions, such as the sale of goods, where delivery and acceptance of the goods are to take place within a limited time, either party often grants to the other party at the request and for the convenience of this other party a postponement of delivery and acceptance. Such relaxation of a term of the contract, though made orally, has been held by judges to be efficacious so that the party who gives the indulgence can no longer go back on his words, despite the fact that the efficacy of such indulgence, being gratuitous, is as a matter of legal theory questionable; it being against the doctrine of consideration and also there being no real distinction which could be found between variation and waiver. These theoretical objections lead text book writers to suggest that waiver as a matter of principle should rest upon equitable principle of promissory or quasi-estoppel – a principle stated by Lord Cairns in *Hughes* v. *Metropolitan Rly. Co.*[3] followed by Bowen L.J. in *Birmingham and District Land Co.* v. *London and North Western Railway Co.*[4] and finally developed by Lord Denning in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[5] and *Charles Rickards Ltd.* v. *Oppenhaim*[6].

Thus notwithstanding theoretical objections and the vagueness of the word "waiver", it is clear that waiver as recognised and applied by the courts only operates to excuse strict performance of a contract or only its mode of performance. It does not extend to the freeing of the party at fault from performance altogether. In fact *Besseler Waechter Clover & Co.* v. *South Derwent Coal Co. Ltd.* (*supra*) cited by the learned trial judge in his judgment, was a case on a contract for the sale of goods, in which the mode of performance was not insisted upon. In this case the seller orally agreed at the request of the buyer to postpone the delivery of coal and it was held that this being a voluntary forbearance to insist upon delivery and acceptance according to the strict terms of the contract, such forbearance did not affect the original contract to sell the coal and that the obligation to deliver and to accept the coal to the full contract quantity still continued, despite such forbearance.

In the present appeal what right did the respondent waive or abandon? Obviously there could not be an abandonment of the right to insist upon strict performance of the contract because the issue between the parties is not the manner or time of the sale of the shophouse or even the condition of the house itself. The fault of the appellant lies in its refusal to sell the house at the contract price, i.e. the very performance itself. We therefore cannot see how waiver could be extended to discharge the appellant from this primary obligation to sell the house to the respondent who was ready and willing to buy it. To extend the principle of waiver beyond its scope, i.e. to excuse performance itself and not merely abandonment of right to insist upon strict performance is in our view completely unjustified. To discharge the appellant from its obligation to sell the shophouse for $49,500 must need more than a mere gratuitous promise. It required a variation or a new agreement supported by consideration. The attempt to create such an agreement was rejected by the respondent.

We also cannot see how the acceptance of the refund of the booking fee by the respondent's former solicitors could be regarded as a waiver excusing the appellant from its primary contractual obligation. The booking fee was treated as a deposit which the respondent was entitled to have taken into account. It had to be taken into account towards payment of the price if the sale went on, or to be returned to him if the sale did not go through, unless of course the respondent committed an act of forfeiture by not complying with the notice requiring him to pay 10% of the contract price. In this case the respondent did not commit any such act. Thus acceptance of the refund is something to which he is entitled and thus under no circumstances can the refund of the booking fee be regarded as forbearance on the part of the appellant. Rather it is its obligation to refund it. Where and what, then, is the forbearance, or indulgence on the part of either party? None whatsoever. It is unthinkable that in the circumstances of this case the acceptance of the refund of a deposit to which the buyer is entitled is construed as a waiver that he waives or abandons his right to insist upon performance of the contract, i.e. insisting upon the seller to sell the house to him. Thus the submission on waiver is completely misconceived.

We think that the proper way to look at this appeal is to treat it as a case of repudiation of the contract. The facts in this case are almost the same as those in *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor.*[7] but the issue in this appeal is different from that in that case. In *Daiman Development's* case, the main issue was whether the booking proforma constituted a binding contract, whereas in the present appeal that question is no longer an issue, since both the Federal Court and the Privy Council in *Daiman Development's* case answered it in the affirmative. What is in issue in the present appeal is, as stated earlier, the legal effect which could be given to the acceptance of the refund of the booking fee by the buyer after he had refused to accept the repudiation of the contract by the seller.

There can be no doubt that the appellant repudiated the contract, which was formed by the booking proforma signed by the respondent on March 3, 1973. By sending its letter dated August 28, 1974 informing the respondent of the price increase the appellant in fact told the respondent that it was no longer prepared and willing to sell the shophouse for $49,500. This refusal constituted what is known as an anticipatory breach. The respondent did not accept the repudiation and this is clear from the letters written on his behalf by his solicitors dated September 10 and October 20, 1974. However, despite the refusal by the respondent to accept the repudiation, the appellant apparently persisted in its repudiation. Such persistence is evident from its solicitors' letters dated September 21, October 5 and November 2, 1974. The letter of September 21, 1974 was not exhibited but only referred to in the letter dated October 5. The appellant's repudiation of the contract could also be inferred from its conduct in the sending of a cheque for $1,000 refunding the booking fee.

The repudiation being clear, the next question is what did the respondent do in face of the appellant's latest repudiation contained in its solicitors' letter dated November 24, 1974? Did he accept or reject the repudiation? If we hold that the respondent did not accept it because in all the letters written on his behalf by his former as well as by his new solicitors he maintained the affirmation of the contract, such unaccepted repudiation did not affect the continuance and existence of the contract. The appellant still remained bound to sell and the respondent to buy the shophouse as agreed at $49,500 when it would be completely built. And by subsequently failing to sell it to the respondent at the contract price or by selling it to someone else the appellant thus committed a breach of the contract for which it must be liable for damages. On the other hand if we hold that the respondent accepted the repudiation because the refund cheque was accepted and cashed by his solicitors or even by himself the contract came to an end on January 13, 1975, when the refund cheque was cleared for payment, but such termination did not absolve the appellant, the party in default, from its obligation to perform the contract and as such the respondent, being the innocent party, was still entitled to sue for damages, and this he did. Thus in the circumstances of this case whatever way we hold – whether the respondent accepted or rejected the repudiation – the appellant, being the defaulting party, is liable for damages.

For reasons given in the foregoing paragraphs the appellant's appeal must fail. The acceptance of the refund of the booking fee was neither a waiver of the respondent's right to performance, nor an estoppel preventing him from suing the appellant for damages, but, if at all, could be construed as an acceptance of the appellant's repudiation of the contract, which in turn brought the contract to an end and at the same time entitled him to sue for

damages. Thus only in the light of repudiation of the contract could the acceptance of the refund have its significance. We therefore dismiss the appellant's appeal. It now remains for us to deal with the respondent's cross-appeal.

The learned trial judge having held that the appellant was bound to compensate the respondent assessed the damages to be $35,500, i.e. the difference between the contract price ($49,500) and the price at which the shophouse was sold to a third party ($85,000). The learned judge also awarded interest at 8% from January 26, 1981, i.e. the date of judgment.

Counsel for the respondent submitted that the damages should be assessed with reference to the market value of the property as at the date of the trial, which according to the evidence of Mr. K. Pasupathy, chartered surveyor practising in Johore Bahru (PW3) and that of the managing director of the appellant (DW1) was $130,000. The effect of this submission is that the damages which should be awarded to the respondent ought to be $80,500 and not $35,500. With respect, we disagree with this submission.

Under sub-section (1) of section 74 of the Contract Act (Act 136), the party who suffered by the breach of a contract is entitled to receive from the defaulting party:

"compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it"

Under sub-section (2) no compensation is to be given "for any remote and indirect loss or damage sustained by reason of the breach".

In our judgment to measure the respondent's loss or damage with reference to the date of the trial is not only unrealistic but also outside the ambit of the rule relating to remoteness of damages. The respondent is only entitled to a sum of money which would compensate him for the loss which naturally arose from the breach. He sustained the loss only when he was deprived of the opportunity to buy the shophouse, and this surely occurred when the appellant sold the house to a third party and not subsequently. It was only on that date that he was to have the house sold to him but it was on that date the house was sold to someone else. Thus if he had to buy the house or another house as a substitute therefor on that date he would have to pay $85,000. In other words he had to find an extra $35,500 over and above the $49,500 contract price. That is the amount which could be regarded as naturally flowing from the breach by the appellant. In fact the law on the subject is already settled in that in the case of breach of contract assessment of damages has to be made as on the date of the breach. *Engell* v. *Fitch*[8] and *Lee Heng & Co.* v. *C. Melchers & Co.*[9]. As the learned trail judge correctly applied the principle counsel's submission must fail.

The next point in the cross-appeal is the question of interest. Counsel for the respondent submitted that interest ought to be awarded from the date of the breach and not from the date of judgment. We do not think that it is proper. Awarding interest is at discretion of the court and it is awarded because the party to whom the award is made is deprived of the use of money. On the date of the breach not only was it not established that the respondent was entitled to damages, but the amount of damages was also unascertained. That being the case, the respondent therefore could not be said to have suffered any deprivation of the use of the money. In fact he lost no money at all. What he lost was only the opportunity to acquire a shophouse at $49,500. We therefore think that the learned trial judge was correct in awarding the interest to commence from the date of the judgment until the date of satisfaction.

Finally we dismiss the appellant's appeal with costs and the respondent's cross-appeal also with costs.

Appeal dismissed.

Solicitors: *A. L. Looi; Yeow & Chin.*

HSU YIK CHAI v. HSU YAW TANG & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Salleh Abas F.J.) May 11 & June 16, 1982]
[Kuching – Federal Court Civil appeal No. 21 of 1982]

Probate and Administration – Will – Construction of – Intention of testator.

In this case the deceased had made a will in which he gave a piece of land in Kuching to his brothers, the respondents, and his wife "to take rightful possession so as to assist them towards the expenses of bringing up and educating my children until they became matured". The widow of the deceased left the children to be brought up by the respondents and she later left and lived with a man. The children were brought up by the respondents until they were grown up. The appellant was adopted by the 2nd